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No. 12
Consolidated with Nos. 27 and 28

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY,

Appellant,

vs.

STATE OF ILLINOIS, ILLINOIS COMMERCE COMMISSION, and MILWAUKEE ROAD COMMUTERS' ASSOCIATION,

Appellees.

On Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

BRIEF FOR APPELLANT.

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BRIEF FOR APPELLANT.

OPINION BELOW.

The report of the Interstate Commerce Commission (R. 28-40) appears at 297 I.C.C. 353. The opinion of the District Court (R. 460-470) is reported at 146 F. Supp. 195.

JURISDICTION.

The final judgment of the District Court was entered June 14, 1956 (R. 470-471). Notice of Appeal was filed by appellant in the District Court June 15, 1956 (R. 472-

474). On August 10, 1956 appellant docketed the case and filed the record thereof and its Jurisdictional Statement with this Court. Order noting probable jurisdiction and consolidating this proceeding with Nos. 27 and 28 was entered December 10, 1956 (R. 486).

The jurisdiction of this Court rests on 28 U.S.C. 1253 and 2101 (b).

STATUTES INVOLVED.

This appeal involves Section 13 (3) and (4) of the Interstate Commerce Act, as amended, 41 Stat. 484, 49 U.S.C. 13 (3) and (4), set forth in the Appendix, *infra*, pp. 1a-2a.

QUESTIONS PRESENTED.

1. Whether a state regulatory body must first sit in judgment on the lawfulness of a railroad's intrastate fares before the Interstate Commerce Commission can exercise its powers under Section 13 (3) and (4) of the Interstate Commerce Act to remove discrimination by such fares against interstate commerce.

2. Whether Interstate Commerce Commission orders increasing a railroad's intrastate fares and interstate fares, respectively, should be set aside for the want of (a) a specific finding of what contribution from intrastate traffic would constitute a fair proportion of the railroad's income; or (b) an alternative finding that the revenue produced by the increased intrastate fares prescribed by the Commission will constitute not more than a fair proportion of appellant's total income, the Commission having found that such fares:

"* * * are necessary so that the travel thereunder may make a fair contribution toward respondent's[1] indirect costs and return on investment, and to enable it, under honest and efficient management, to provide adequate and efficient service at the lowest cost consistent with the furnishing of such service."

3. Whether there was substantial evidence to support the Commission' findings of undue, unjust, or unreasonable discrimination against interstate commerce, and that the increased fares ordered by the Commission are just and reasonable.

STATEMENT.

The Historical Background.

Appellant is an interstate railroad operating within and between the states of Idaho, Illinois, Indiana, Iowa, Michigan, Minnesota, Missouri, Montana, Nebraska, North Dakota, South Dakota, Washington, and Wisconsin. Included in its service to the public is the transportation of passengers in the Chicago suburban area over lines between Chicago and Elgin, Illinois, to the west, and between Chicago and Walworth, Wisconsin, to the north (R. 99).

In July, 1952, faced with an annual out-of-pocket loss[2] of over $1,000,000 a year from its suburban passenger operations in the Chicago area, appellant petitioned the Illinois Commerce Commission for leave to discontinue non-rush hour trains, and to increase its intrastate suburban fares in Illinois sufficiently to eliminate its out-of-pocket loss (R. 77). Two years and four months later,

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[1] Appellant herein.

[2] "Out-of-pocket loss" refers to the deficit remaining after deducting suburban passenger revenues from out-of-pocket expenses incurred in performing the suburban service. "Out-of-pocket expenses" are those expenses which, over a period of time, would be avoided if the service were not performed.

on November 10, 1954, the Illinois Commerce Commission denied any relief whatever to appellant either as to train discontinuance or fare increase (R. 77-92).

It denied a fare increase on the theory that appellant, having dieselized its service since the close of the hearings before the Illinois Commerce Commission, no longer suffered an out-of-pocket loss, but instead enjoyed a net railway operating income of $224,000 annually from its suburban operation (R. 86). The Illinois Commerce Commission, however, overestimated appellant's savings from dieselization by $452,996 a year, relying on the estimates of a New York transportation engineer[3] based on utilization of 1500 HP diesels (R. 81). With the exception of one locomotive handling one light train a day in each direction, 1500 HP diesels proved inadequate, the suburban operation requiring, in addition, five 1750 HP and twelve 2000 HP diesels (R. 165-166, 169).

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[3] His estimate of various expenses for a six-month period (R. 82) is compared to actual expenses during the four-month period following dieselization (R. 385-387), increased 50% to reflect a six-month operation:

	Estimated	Actual	Difference
Locomotive Repairs	$ 52,600	$ 91,280	$ 38,680
Car Repairs	134,000	120,175	(13,825)
Trainmen	221,800	232,078	10,278
Engine Crew	132,000	178,846	46,846
Fuel	75,000	116,394	41,394
Enginehouse	35,000	58,105	23,105
Train Supplies and Expenses	42,000	95,800	53,800
Water, Lubrication and Supplies	10,500	8,617	(1,883)
Miscellaneous	5,200	7,641	2,441
Payroll Taxes	44,200	37,282	(6,918)
Interest on Investment at 3%	45,000	——	(45,000)
Depreciation of Locomotives	——	77,580	77,580
	$797,300	$1,023,798	$226,498

The State Commission also rejected, as part of the expense of the suburban operation, nearly $290,000 of the annual rental paid for the use of Chicago Union Station of which appellant would be relieved if the suburban service were discontinued (R. 83-85).

The Interstate Commerce Commission Proceeding.

Within three months after the Illinois Commerce Commission's refusal to grant relief, appellant sought (1) an investigation by the Interstate Commerce Commission into the lawfulness of its Illinois intrastate suburban fares, and (2) permission to increase its interstate suburban fares (R. 24-27). The Interstate Commerce Commission by order entered March 4, 1955, instituted an investigation under the provisions of Section 13 (3) and (4) of the Interstate Commerce Act, 40 U.S.C., Section 13 (3) and (4), (App. A. *infra*, pp. 1a-2a) to determine:

(1) Whether appellant's intrastate fares in the Chicago suburban area made or imposed by authority of the State of Illinois cause any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce, on the one hand, and interstate commerce, on the other hand, or any undue, unreasonable, or unjust discrimination against interstate commerce;

(2) What fares should be prescribed to remove any unlawfulness found to exist; and

(3) Whether certain outstanding orders of the Commission should be modified to permit increased interstate and intrastate fares (R. 28-29).

After several days of hearings before an examiner (R. 95-372) at which numerous exhibits were introduced (R.

373-436), a proposed report was issued to which exceptions were filed by appellees, and appellant replied (R. 28-40).

On November 21, 1955 the Commission issued its report containing findings:

1. "That respondent's present suburban fares do not produce sufficient revenue to cover the out-of-pocket cost of the service and thus make no contribution toward its indirect costs nor to a return on investment.[4]
2. That respondent's present intrastate suburban fares, made or imposed by authority of the State of Illinois, cause and, unless increased to the extent herein set forth, will continue to cause undue, unreasonable, and unjust discrimination against interstate commerce, in violation of section 13 (4) of the Interstate Commerce Act.
3. That such undue, unreasonable, and unjust discrimination can and should be removed by establishing for such intrastate travel fares no lower than the bases set forth as prescribed in the appendix hereto.
4. That such prescribed fares will be just and reasonable for the future, will produce substantial additional revenue, and are necessary so that the travel thereunder may make a fair contribution toward respondent's indirect costs and return on investment, and to enable it, under honest and efficient management, to provide adequate and efficient service at the lowest cost consistent with the furnishing of such service.

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[4] This finding is supported by a subsidiary finding that for the year 1954, the total revenues from the passenger-carrying portion of the suburban service were $1,799,140, the out-of-pocket cost, not including nonpayroll taxes or return, was $2,269,404, and the credit for nonrevenue passengers $164,226, resulting in a total out-of-pocket deficit of $306,038 (R. 34).

5. That respondent's interstate suburban fares on the same bases as herein prescribed for intrastate application will be just and reasonable for the future." (R. 36-37).

On the same date the Commission issued an order authorizing appellant to increase its interstate suburban fares between Wisconsin and Illinois points to the prescribed basis (R. 41-42) and such fares became effective January 29, 1956.

The Commission, however, withheld an order increasing appellant's Illinois intrastate fares to afford the Illinois Commerce Commission an opportunity to authorize the increase (R. 37). Upon failure of the Illinois Commerce Commission to act (R. 10), the Interstate Commerce Commission by its order of March 2, 1956, directed appellant to increase such fares to the prescribed basis, effective April 20, 1956 (R. 75-77).

The Opinion and Orders of the District Court.

Suit was brought on April 13, 1956 by the State of Illinois and Illinois Commerce Commission (hereinafter sometimes called the "State Commission"), and the Milwaukee Road Commuters Association (hereinafter sometimes called "protestant"), appellees herein, to set aside the Interstate Commerce Commission's report and order of November 21, 1955, and its order of March 2, 1956 (R. 2-23). Appellees' complaint was predicated on: (1) alleged lack of authority or jurisdiction of the Interstate Commerce Commission to increase appellant's intrastate suburban fares; and (2) alleged lack of evidence on which to base findings that appellant's intrastate suburban fares caused unjust discrimination against interstate commerce and that the intrastate fares prescribed by the Interstate Commerce Commission are fair and reasonable (R. 21). By

amendment filed June 4, 1956, appellees also alleged that the findings in the report and order of November 21, 1955 were inadequate to support or justify the Interstate Commerce Commission's exercise of authority to prescribe intrastate fares (R. 458-460).

Appellees' motion for a temporary restraining order against enforcement of and compliance with the Interstate Commerce Commission's order was heard on April 18, 1956. In opposition thereto appellant presented an affidavit of its Assistant General Passenger Agent showing that the fares prescribed are on the same level as fares authorized by the Illinois Commerce Commission and currently in effect in the Chicago suburban area on the Chicago and North Western Railway which serves territory adajcent to that of appellant, and on the Chicago, Rock Island and Pacific Railroad (R. 437-439). The District Court, by order entered April 18, 1956, denied the motion for the temporary restraining order upon condition that appellant impound the excess fares collected from and after April 20, 1956, the effective date of the order increasing the intrastate fares (R. 76, 440-441).

On June 14, 1956 the District Court issued its opinion finding the Interstate Commerce Commission's orders invalid for:

(1) Lack of authority or justification for increasing appellant's fares until the Illinois Commerce Commission has been given a chance to fix the fares on the same evidence and same basis (R. 469-470);

(2) Want of a finding as to what contribution from the intrastate suburban traffic would constitute a fair proportion of appellant's total income, or an alternative finding that the revenue produced by

the prescribed intrastate fares will constitute not more than a fair proportion of appellant's total income (R. 463-467); and,

(3) Lack of sufficient evidence to support the finding that the prescribed fares are just and reasonable (R. 467-469).

Judgment was entered on the same date declaring the report and orders of the Interstate Commerce Commission to be beyond its power and an abuse of its authority, and unsupported by the findings and evidence. The subject matter was remanded to the Interstate Commerce Commission for further proceedings not inconsistent with the Court's opinion. The Interstate Commerce Commission was permanently enjoined from enforcing its report and orders, and the appellant from continuing to give effect to the fares prescribed. Appellant was further directed to refund all monies received as excess fares under the District Court's order of April 18, 1956 (R. 470-471).

An order staying the injunction was entered June 18, 1956, upon condition that appellant continue to impound the excess fares collected after April 20, 1956, and refund them in the event the judgment of the District Court were affirmed or the appeal dismissed or discontinued (R. 474-476).

Motion t amend or correct the judgment and opinion of the District Court was filed July 20, 1956 by the United States of America and the Interstate Commerce Commission to exclude therefrom reference to the Commission's order of November 21, 1955 fixing interstate fares, and to exclude any statement that would make it a condition precedent to action by the Interstate Commerce Commission under 49 U.S.C. 13 (4) for appellant first to

present the same evidence to the Illinois Commerce Commission as presented to the Interstate Commerce Commission (R. 479-481). The motion was denied (R. 482).

Notices of appeal were filed on June 15, 1956 by appellant (R. 472-474) and on August 13, 1956 by the United States of America and the Interstate Commerce Commission (R. 483-485).

SUMMARY OF ARGUMENT.

I. Power of Interstate Commerce Commission to Remove Discrimination Against Interstate Commerce.

The power of the Interstate Commerce Commission under Section 13 (3) and (4) of the Interstate Commerce Act to remove discrimination against interstate commerce by increasing intrastate fares can not be defeated by an alleged lack of opportunity for the State Commission to adjust such fares on the same basis and evidence as submitted to the Interstate Commerce Commission. Items of expense not included in the earlier proceeding before the State Commission were then either nonexistent or of such relatively minor consequence that their submission to the State Commission could not have changed its refusal to recognize appellant's out-of-pocket deficit. Likewise, their exclusion from the out-of-pocket deficit found by the Interstate Commerce Commission would have left a substantial loss on which to base the Commission's finding that the revenue failed to cover the out-of-pocket expense of the service.

The State Commission, in fact, had an opportunity to fix appellant's fares on the same evidence and basis submitted to the Interstate Commerce Commission. The State Commission was an active participant in the Interstate

Commerce Commission's proceeding and had possession of all the evidence upon which the Interstate Commerce Commission acted, and had more than ample time in which to reopen its own proceeding and approve the same increases as prescribed by the Interstate Commerce Commission. The State Commission not only declined to do so, but attacked the sufficiency of the evidence to support such an increase. Its actions, as well as its failures to act, leave not the slightest reason to believe that it would grant the same increase on such evidence, or any increase whatever.

Finally, the federal law does not tolerate the delay in removing discrimination against interstate commerce incident to a prior adjudication of entirely different issues under state law.

II. Findings Adequate to Support Orders.

The District Court would strike down the Commission's orders fixing appellant's suburban fares for lack of a finding as to what contribution from its intrastate suburban traffic would constitute a fair proportion of the total income. In the case cited by the Court, *North Carolina* v. *United States*, 325 U.S. 507, such a finding, if made, would have been accepted as a substitute for a finding that the intrastate fares were not compensatory or failed to meet the full cost of service. In the present case the Commission found not merely that the intrastate fares were insufficient to cover the full cost of the service but the out-of-pocket expenses alone.

Further, the alternate finding that the District Court indicated would be satisfactory, *i.e.* that the revenue produced by the prescribed fares would constitute not more than a fair proportion of appellant's total income, is sub-

stantially the same as the Commission's finding that such fares "are necessary so that travel thereunder may make a fair contribution toward [appellant's] indirect costs and return on investment . . ." All other necessary findings were made by the Commission.

III. Evidence Sufficient to Support Findings.

The District Court held the evidence insufficient only as to the finding that the prescribed fares will be just and reasonable. It erroneously believed that such fares will cover not only all the cost of the suburban service, but other costs as well. The additional revenue, in fact, defrays only a fraction of the deficit based on the full cost of the service.

The Commission's finding of just and reasonable fares for appellant based on the Chicago and North Western fare level operated as a hold-down rather than as a justification of the increase. Much additional evidence on which a finding of a higher just and reasonable fare level might have been made was considered by the Commission.

Although the District Court challenged no other finding as without sufficient support, appellees attacked the sufficiency of the evidence to support the finding that the existing fares failed to meet the out-of-pocket costs and caused an undue, unjust, and unreasonable discrimination against interstate commerce. These findings, in turn, were based on another finding in dollars of the revenues and expenses attributable to the suburban service, from which the Commission excluded substantial out-of-pocket expenses. There can be no basis, therefore, for any attack on the findings as lacking support in the evidence.

IV. Effect of the Interstate Commerce Commission's Orders.

The Commission's orders will not discriminate against intrastate commerce. Like increases in the interstate suburban fares were made three months before the increased intrastate fares became effective. The Commission is actively investigating the interstate through passenger service deficit and has already granted increases in interstate through passenger fares.

If the Commission's orders are set aside, appellant would be compelled to refund an amount now approximating $500,000, not from non-existent profits of the suburban service, but from its system earnings which produce only a marginal rate of return. These orders merely require the suburban passenger to pay the same or lower fares than in effect on various other railroads in the Chicago area, and impose a reasonable condition on the use by a state of an interstate system for intrastate commerce.

ARGUMENT.

I. The Power of the Interstate Commerce Commission Under Section 13 (3) and (4) of the Interstate Commerce Act to Remove Discrimination Against Interstate Commerce by Increasing Intrastate Fares is not Dependent Upon Prior Adjudication of Their Lawfulness Under State Law by a State Commission.

The District Court characterized appellant as deliberately removing from the consideration of the State Commission in the 1952 state proceeding certain items claimed as out-of-pocket expense in 1954 before the Interstate Commerce Commission, *i.e.*, depreciation of locomotives and coaches, and certain maintenance of way expense (R. 461, 469). The District Court then concluded: "If different evidence is to be offered or a different basis of fares is to be urged before the interstate commission, the state commission should have been given a chance to fix fares on the same evidence and the same basis." (R. 496).

A. Reasons for and Effect of Elimination of Certain Expenses before State Commission.

The items, totaling $258,172 (R. 16), were included in the 1954 Interstate Commerce Commission proceeding as out-of-pocket expenses in accordance with the formula for comparison of railroad revenues and expenses for suburban and commutation services developed by the Cost Section of the Interstate Commerce Commission's Bureau of Transport Economics and Statistics (R. 133, 359).

The implication, however, that appellant practiced deceit by withholding them from the State Commission in 1952 is ill-founded. Of the $258,172 in question, $155,160

represents annual depreciation of modern diesel locomotives, computed on a 20-year service life, which were assigned to the suburban service in 1954, *two years after appellant had presented its evidence to the State Commission* (R. 130; Ex. 13-B, Sh. 2, line 49(b), R. 351, 386). The locomotives in operation in 1952 ranged in age from 22 to 42 years (R. 78). The major difference in the expense figures is thus accounted for by changes in physical operations during appellant's long wait of two years and four months for the State Commission's decision[5] which denied all relief and necessitated action by the Interstate Commerce Commission.

Concerning the omission of the remaining of $103,012, appellant's comptroller testified that at the time of the 1952 State Commission proceeding, the out-of-pocket expenses of the suburban operation were so far in excess of the existing revenues, plus any revenue increase which might be expected, that only *immediately* relievable expenses were included (R. 242, 358-359). The wide spread between the out-of-pocket expenses and revenues at that time is confirmed by protestant's own exhibit which concedes an out-of-pocket deficit in 1952 of $863,925 (Ex. 34, R. 345, 428). The State Commission nevertheless concluded on the basis of faulty estimates (p. 4, *supra*) that, having since dieselized, appellant suffered no out-of-pocket loss, but instead enjoyed a net railway operating income from its suburban operation of approximately $224,000 annually. An additional expense of $103,012 could not have altered its refusal to recognize any out-of-pocket loss. Conversely, a deduction of $103,012 from the out-of-pocket deficit of

[5] For lesser delays, the State Commission has been repeatedly admonished by federal and state courts. (See **Smith v. Illinois Bell Telephone Co.**, 270 U.S. 587; **Chicago B. & Q. R. Co. v. Illinois Commerce Commission, et al.**, 82 Fed. Supp. 368, 375; **Pullman Co. v. Illinois Commerce Commission**, 390 Ill. 40, 60 N.E. 2nd 232).

$306,038, as found by the Interstate Commerce Commission, (R. 34) would still have left an out-of-pocket deficit of $203,026 to substantiate the Interstate Commerce Commission's finding that the fares failed to meet the out-of-pocket expense.

B. Availability of Opportunity for State Commission to Fix Fares on Same Evidence and Basis as the Interstate Commerce Commission.

The District Court's assumption that the State Commission was not afforded the same opportunity as the Interstate Commerce Commission to fix appellant's intrastate fares on the same evidence and same basis is contrary to fact. In its order of November 10, 1954, refusing appellant an increase in its suburban fares, the State Commission expressly retained jurisdiction of the parties and subject matter for the purpose of entering such further orders as it might consider proper (R. 92). The State Commission entered its appearance (R. 28) and actively participated in the proceeding before the Interstate Commerce Commission, cross-examining appellant's witnesses (R. 168-170, 173-180, 234-241), and offering new evidence by its own transportation analyst (R. 345-348).

The State Commission, therefore, had in its possession all the evidence as presented to the Interstate Commerce Commission. After the hearing closed on May 23, 1955 (R. 372), the State Commission had ample opportunity prior to the issuance of the Interstate Commerce Commission's report on November 21, 1955 to reopen its own proceeding and fix appellant's fares in accordance with such evidence. The Interstate Commerce Commission even then withheld an order fixing appellant's intrastate fares to give the State Commission a further opportunity to act (R. 37). Instead,

the State Commission in a petition for reconsideration attacked the sufficiency of the evidence to warrant the fare increase found necessary by the Interstate Commerce Commission (R. 68-75). It was only after the State Commission declined the opportunity to fix the fares on the same evidence and basis that the Interstate Commerce Commission finally ordered the intrastate fares increased effective April 20, 1956. (R. 75-77)

C. Necessity of Opportunity for the State Commission to Fix Fares on the Same Evidence and Basis as the Interstate Commerce Commission.

Section 13(3) and (4) of the Interstate Commerce Act deals only with the removal of discrimination against interstate commerce by fares, rates, charges, etc. made or imposed by authority of a state. It is not necessary that such fares be prescribed by the state or result from any affirmative action on its part. It is sufficient that they are maintained in intrastate commerce subject to the authority of the state and published as required by its laws. *Florida* v. *United States*, 282 U.S. 194, 209. Hence, it is not the action of the State Commission with which the Interstate Commerce Commission deals, but the fares themselves and the adequacy of their contribution to the cost of running an interstate railroad.

Had Congress intended that the Interstate Commerce Commission forego the performance of its duties under Section 13(4) of removing undue, unreasonable, or unjust discrimination against interstate commerce until a decision has been rendered by the State Commission on the lawfulness of the fares under state law, it could easily have so provided. It did not do so; therefore,

> "To hold, as some of the appellants urge, that there can be no adjustment of intrastate rates by the Interstate Commerce Commission so far as may be needed

to protect interstate commerce until the state itself has first 'sat in judgment on the issue of the lawfulness of those intrastate rates' would be to impose a limitation not required by the terms of the statute and repugnant to the grant of authority.". (*Florida* v. *United States*, 282 U.S. 194, 210).

II. The Interstate Commerce Commission's Orders Are not Invalid for Lack of Adequate Findings.

The District Court repeatedly refers to the lack of a finding of what contribution from the intrastate suburban traffic would constitute a fair share of appellant's total income (R. 463-467) and concludes that without such a finding the order can not stand (R. 465).

Appellant has been unable to find, in a survey of cases before this Court, any holding that such a finding is essential to the validity of a Commission order under Section 13(4). The survey included, among others, the following cases:

1. *Railroad Commission of Wisconsin* v. *Chicago B. & Q. R. Co.*, (1922) 257 U.S. 563, upholding an order of the Commission increasing intrastate passenger fares in Wisconsin, 59 I.C.C. 391.

2. *State of New York* v. *United States*, (1922) 257 U.S. 591, upholding order increasing intrastate passenger fares in the State of New York, 59 I.C.C. 290.

3. *Florida* v. *United States*, (1930) 282 U.S. 194, setting aside order increasing intrastate rates on logs in Florida, 146 I.C.C. 717.

4. *Georgia Public Service Commission* v. *United States*, (1930) 283 U.S. 765, upholding order increasing intrastate rates on chert, sand, and gravel in Georgia, 160 I.C.C. 309.

5. *Louisiana Public Service Commission* v. *T. & N. O. R. Co.*, (1931) 284 U.S. 125, upholding order increasing intrastate rates on sand, gravel, and other commodities in Louisiana, 155 I.C.C. 247, 157 I.C.C. 498.

6. *United States* v. *Louisiana*, (1933) 290 U.S. 70, upholding order increasing intrastate rates on various commodities in Louisiana, 186 I.C.C. 615.

7. *Florida* v. *United States*, (1933) 292 U.S. 1, upholding order increasing intrastate rates on logs in Florida, 186 I.C.C. 157, 190 I.C.C. 588.

8. *North Carolina* v. *United States*, (1945) 325 U.S. 507, and *Alabama* v. *United States*, (1945) 325 U.S. 535, setting aside order increasing intrastate passenger fares in North Carolina, Alabama, Tennessee, and Kentucky, 258 I.C.C. 133. See discussion following.

9. *King* v. *United States*, (1952) 344 U.S. 254, upholding order increasing intrastate freight rates on commodities generally in Florida, 278 I.C.C. 41.

In Nos. 4, 6, 7 and 9 the Commission's findings were challenged as inadequate but, although they included no finding as to what amount the intrastate traffic should contribute to the total income, were approved by this Court.

The District Court relies upon *North Carolina* v. *United States*, *supra*; 325 U.S. 507, as its authority for striking down the Commission's order for want of such finding (R. 464). In that case, however, the evidence indicated that the North Carolina intrastate passenger fares which the Interstate Commerce Commission had ordered increased were already producing a profit. This Court, in the light of such evidence, observed that:

> "Neither in its formal findings nor in its discussion of the facts did the Commission indicate that the North

> Carolina railroad rates here involved were less than compensatory or insufficient to cover the full cost of service." p. 515.

Solely for this reason did a finding become necessary as to what amount the intrastate traffic should contribute as its fair share of the total income, by which the ultimate conclusion that the existing fares discriminated against interstate commerce could be confirmed. In the present case the Commission found not merely that the existing suburban fares were insufficient to meet the *full* cost of service, but found them insufficient to cover even the out-of-pocket expense thereof (R. 36).

The District Court indicates a willingness to accept an alternative finding that the prescribed fares will contribute not more than a fair proportion of the total income (R. 464). If such a finding could cure a defect which appellant has shown is purely imaginary, it has, in effect, been made, the Commission finding:

> "That such prescribed fares will be just and reasonable for the future, will produce substantial additional revenue, and are necessary so that the travel thereunder may make a fair contribution toward respondent's indirect costs and return on investment, and to enable it, under honest and efficient management, to provide adequate and efficient service at the lowest cost consistent with the furnishing of such service." (R. 37).

The District Court refuses to accept this finding on the ground that a fair proportion of total income is not the same as a contribution toward indirect costs and return on investment (R. 465). Appellant, however, pays the indirect costs of each service and obtains a return, if any,

from its income. A fair contribution to a part cannot exceed a fair proportion of the whole.

As recognized by this court in *Florida* v. *United States*, 282 U.S. 194, 214, however, it is not enough that the Commission merely find the existing intrastate fares on particular traffic not remunerative or reasonably compensatory, because the raising of fares does not necessarily increase revenue. A finding that additional revenue will result from the prescribed fares is essential, and was made (R. 34, 37). Likewise, the further finding required in the *North Carolina Case* that the prescribed fares will not exceed a just and reasonable level was specifically made (R. 37). Accordingly, the Commission's order is firmly based on adequate findings.

III. The Findings of the Commission Find Ample Support in the Evidence.

The remaining ground on which the District Court would hold the Interstate Commerce Commission's order invalid is the alleged lack of evidence to support its finding that the prescribed fares are just and reasonable (R. 469). The Court, however, was under a misapprehension that such fares would pay, not only all of the costs of the suburban service but other costs of the railroad as well, and thus might well be contributing more than a fair proportion of the total income (R. 465).

"All the costs" or "full cost" of the suburban service includes not only the out-of-pocket expenses, of which appellant would over a period of time be relieved if the suburban service were discontinued, but fully distributed expenses as well. The latter expenses include out-of-pocket expenses plus a fair allocation of constant expense incurred jointly with other traffic (R. 134). The propriety,

in fact the necessity, of taking into account the fully distributed expenses was firmly established by this Court in *Northern Pacific R. Co.* v. *North Dakota*, 236 U. S. 585, 596:

> "We say this, for we entertain no doubt that, in determining the cost of the transportation of a particular commodity, all the outlays which pertain to it must be considered. We find no basis for distinguishing in this respect between so-called 'out-of-pocket costs,' or 'actual' expenses, and other outlays which are none the less actually made because they are applicable to all traffic, instead of being exclusively incurred in the traffic in question. Illustrations are found in outlays for maintenance of way and structures, general expenses and taxes. It is not a sufficient reason for excluding such, or other, expenses to say that they would still have been incurred had the particular commodity not been transported. That commodity has been transported; the common carrier is under a duty to carry, and the expenses of its business at a particular time are attributable to what it does carry."

Appellant's evidence shows a deficit on a fully distributed expense basis, without any allowance for a return on investment, of over 1.8 million dollars a year (Exs. 13-A and 15, R. 351, 382, 388). Protestant's Exhibit 34 (R. 351, 428) shows a corresponding deficit of over 1.4 million dollars. The additional $383,000 to be derived from the prescribed fares (R. 34) will, therefore, pay but a small part of the full deficit of the suburban service, leaving no possibility that it will pay the expenses of any other service. On the contrary, there remains a deficit of well over a million dollars a year, even with the reductions claimed by appellees, which must be borne by the freight operations of appellant. Representatives of interstate shippers of coal, paper, pulp, and canned goods over appellant's lines testified before the Interstate Commerce

Commission in support of increases in fares in order that their traffic might bear no more of the cost of the suburban traffic than necessary (R. 111-127).

The Interstate Commerce Commission might well have ordered an increase in appellant's intrastate fares producing four or five times more than the $383,000 additional revenue from the prescribed increases without increasing the fares more than necessary to remove discrimination against interstate commerce. Section 13 (4), however, confers no authority to raise intrastate fares above a reasonable level. *United States* v. *Louisiana*, 290 U.S. 70, 78. Hence, the determination by the Commission of a just and reasonable fare level served not to justify the increase but rather to limit it, permitting a recovery of only a part of the full cost of the service.

Solely at the request of the examiner, appellant offered evidence of the Chicago and North Western suburban fare level which yields an increase in revenue to appellant of only 21 per cent (Exs. 18, 19, R. 181, 393-394). In doing so appellant's counsel stated as quoted by the court: "We do not offer these North Western fares as a criteria (*sic*) as to what our fares should be." (R. 467, 468). Throughout the proceeding appellant contended that a just and reasonable fare level would yield not less than 29.4 per cent additional revenue (R. 26, 152).

As proof that the suburban traffic could bear such increased fares, appellant showed that they would be lower than fares already in effect on the Illinois Central, and Chicago South Shore and South Bend, in the Chicago suburban area. (Ex. 35, R. 354, 432-436). Appellant also offered evidence of higher fares received for slower service by other carriers serving the same territory as appellant (R. 155-159). The protestant, in turn, offered evi-

dence of lower fares on the Chicago, Burlington & Quincy and Chicago, Rock Island and Pacific railroads.[6] The Commission, however, deemed the level of the Chicago and North Western fares as more persuasive than those tendered for comparison by either appellant or appellees, particularly in view of the similarity of the territory served by the two lines and of their previous fares. (R. 35)

Dissimilarity between 1951 operating conditions of the Chicago and North Western and those of appellant in 1954, mentioned by the District Court (R. 468), in no way impairs the use of the Chicago and North Western's fares to determine what the Chicago suburban traffic can bear toward paying the cost of the service. Should the numerous fare comparisons submitted to the Commission be inadequate to determine a just and reasonable level for appellant's fares, the Commission also had before it sufficient evidence of the out-of-pocket and fully distributed costs of appellant's service (R. 129-147); increases in earnings of industrial employees more than double the increase in suburban fares since 1940 (Ex. 15, R. 351, 392); the amount of service provided (Exs. 4 and 5, R. 351, 375-378) the equipment, trackage, maintenance and repair facilities, heated and lighted passenger stations, and train crews and other personnel required (R. 99-110). The record is thus replete with evidence, apparently overlooked by the District Court, that supports the finding that the prescribed fares are just and reasonable.

There is no challenge by the District Court of the sufficiency of the evidence to support any other finding, but appellees in their complaint attack the sufficiency of the

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[6] As shown in the affidavit introduced in the court proceeding, the fares of the latter line have been approved by the Illinois Commerce Commission on the same basis as those prescribed by the Interstate Commerce Commission for appellant (R. 437-439).

evidence to support the findings that the previous fares resulted in an out-of-pocket deficit and caused discrimination against interstate commerce (R. 14-19).

Although the Commission conceded that appellant would be relieved of $305,530 a year of Chicago Union Station expense if its suburban service were discontinued (the accepted test of an out-of-pocket expense), it disallowed $233,642 thereof. It believed that it was following a formula used by appellant in numerous prior proceedings (R. 33, 34), but, as testified by appellant's comptroller, with such items as taxes and interest eliminated therefrom, the formula was no longer recognizable, even by its author (R. 356). Appellant offered to show that $305,530 was a fair rental for the use of the Chicago Union Station by its suburban operation, but such evidence was excluded on objection (R. 257, 258).

The Commission also reduced appellant's out-of-pocket expenses by a credit of $164,226 for nonrevenue passengers despite that only $17,928 would be saved if they were not hauled (R. 361).

Thus the Commission cut sharply appellant's out-of-pocket deficit by disallowing approximately $380,000 of actual out-of-pocket expenses. Its finding of a remaining out-of-pocket deficit of $360,038 and a resulting discrimination against interstate commerce, as well as its other findings, certainly do not go beyond the evidence.

IV. The Effect of the Commission's Orders is to Impose a Reasonable Requirement on the Use by a State of an Interstate Railroad System for Intrastate Commerce.

It may be argued by appellees that the effect of the Interstate Commerce Commission's orders is to discrim-

inate against intrastate traffic by increasing suburban fares in the face of a greater through passenger service deficit of appellant. But the Commission also ordered the interstate suburban fares increased almost three months before ordering a like increase in the intrastate suburban fares (R. 41-42, 75-77). Commutation fares for the longer hauls in suburban territory will remain at a lower rate per mile than any through passenger fare (R. 36).

Congress, in enacting Section 13(3) and (4) sought to make the interstate railroads adequate to the needs of the country by securing for them a reasonably compensatory return for all the work done. *Railroad Commission of Wisconsin* v. *Chicago B. & Q. R. Co.*, 257 U. S. 563, 589. As stated by the Commission, the fact that appellant "can not make a profit or at least so far has been unable to make a profit on its other passenger-train service is no reason for depriving it of an opportunity to make a profit on its suburban operations if it can be done at lawful fares." (R. 36).

Nor has the Commission overlooked the through passenger service with its special problems arising from air and private automobile competition. In addition to granting increases in interstate fares for such service, it has on its own motion instituted an investigation into the deficit from passenger-train and allied services by railroads subject to its jurisdiction, prompted by the serious concern which the passenger-service deficit causes not only the railroads, but the Commission and State Commissions, shippers, and the public generally.[7]

If the District Court's judgment setting aside the Commission's orders is allowed to stand, appellant will be

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[7] 70th Annual Report of the Interstate Commerce Commission (November 1, 1956) pp. 50, 53.

required to refund the increases collected, which at the date hereof approximate $500,000. Such refund would be made, not from any profits from the suburban operation, which, even with the increased fares, results in a substantial deficit, but from the other earnings of an interstate system producing a bare return on investment of from 1.89 per cent to 2.27 per cent.*

This case illustrates the very evil that Congress sought to abolish: namely, the draining away of already inadequate earnings from an interstate transportation system by a state's use thereof for intrastate traffic. As so aptly stated in *Railroad Commission of Wisconsin* v. *Chicago B. & Q. R. Co.*, 257 U.S. 563, 589, 590:

> "The States are seeking to use that same system for intrastate traffic. That entails large duties and expenditures on the interstate commerce system which may burden it unless compensation is received for the intrastate business reasonably proportionate to that for the interstate business. Congress, as the dominant controller of interstate commerce, may, therefore, restrain undue limitation of the earning power of the interstate commerce system in doing state work. The affirmative power of Congress in developing interstate commerce agencies is clear. *Wilson* v. *Shaw*, 204 U. S. 24; *Luxton* v. *North River Bridge Co.*, 153 U. S. 525; *California* v. *Central Pacific R. R. Co.*, 127 U. S. 1, 39. In such development, it can impose any reasonable condition on a State's use of interstate carriers for intrastate commerce it deems necessary or desirable. This is because of the supremacy of the national power in this field."

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* Source: Annual Reports of appellant to the Interstate Commerce Commission 1952, 1953, and 1954, stipulated into the record by counsel. (R. 315).

The orders of the Commission herein do not eliminate the full cost of service deficit of the suburban operation, let alone producing compensation reasonably proportionate to the small return from the system operations.

From the standpoint of the suburban passenger, the upholding of the Commission's orders will merely require him to pay (1) the same fares as approved by the State Commission three years earlier for the Chicago and North Western, which serves suburban areas immediately adjoining those served by appellant; (2) the same fares as now in effect on the Chicago, Rock Island and Pacific Railroad with the State Commission's approval; and (3) substantially less than suburban fares on the Chicago South Shore and South Bend and the Illinois Central railroads.

The Commission, therefore, has imposed a very modest and reasonable condition on the use by a state of an interstate transportation system for intrastate commerce. Its orders should be upheld.

CONCLUSION.

For the reasons stated it is respectfully submitted that the judgment of the District Court should be reversed and the orders of the Interstate Commerce Commission reinstated.

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August 23, 1957

APPENDIX.

The Pertinent Provisions of the Interstate Commerce Act (United States Code, Title 49), Involved in this Case are as follows:

Section 13(3)—

"Whenever in any investigation under the provisions of this part, or in any investigation instituted upon petition of the carrier concerned, which petition is hereby authorized to be filed, there shall be brought in issue any rate, fare, charge, classification, regulation, or practice, made or imposed by authority of any State, or initiated by the President during the period of Federal control, the Commission, before proceeding to hear and dispose of such issue, shall cause the State or States interested to be notified of the proceeding. The Commission may confer with the authorities of any State having regulatory jurisdiction over the class of persons and corporations subject to this part or part III with respect to the relationship between rate structures and practices of carriers subject to the jurisdiction of such State bodies and of the Commission; and to that end is authorized and empowered, under rules to be prescribed by it, and which may be modified from time to time, to hold joint hearings with any such State regulating bodies on any matters wherein the Commission is empowered to act and where the rate-making authority of a State is or may be affected by the action taken by the Commission. The Commission is also authorized to avail itself of the cooperation, services, records, and facilities of such State authorities in the enforcement of any provision of this part or part III."

Section 13(4)—

"Whenever in any such investigation the Commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is hereby forbidden and declared to be unlawful, it shall prescribe the rate, fare, or charge, or the maximum or minimum or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination. Such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by the carriers parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding."